

STATE OF INDIANA)
) SS:
COUNTY OF JENNINGS)

IN THE JENNINGS CIRCUIT COURT

CAUSE NO. 40C01-0203-PL-055

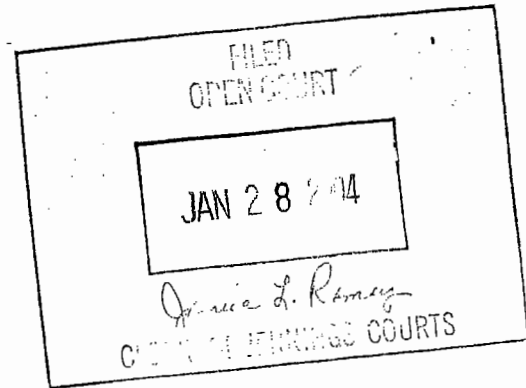
RICHARD SCHINDLER)
by his Sister and Guardian)
CAROLYN ERNSTBERGER, *et al.*)

Plaintiffs,)

v.)

JOSEPH KERNAN,)
Governor of the State of Indiana, *et al.*)

Defendants.)



COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND APPROVAL OF THE SETTLEMENT AGREEMENT

The certified Class both in person and by Class Counsel and the Defendants, by Counsel, appeared before the Court on January 22, 2004 for the purpose of a hearing on Class Counsels' request to approve the tendered Settlement Agreement. At the hearing, the Court heard both evidence and argument favoring approval of the settlement. In addition, no individual class members appeared for the purpose of objecting to the settlement. Having considered all of the arguments, evidence and class member objections, the Court now issues the following Findings of Fact and Conclusions of Law and Entry APPROVING the parties' Settlement Agreement pursuant to Ind. Trial Rule 23(E).

BACKGROUND AND FINDINGS OF FACT

1. The Plaintiffs and the certified Class Members are patients residing at Muscatatuck State Developmental Center, Butlerville, IN [hereinafter referred to as MSDC] as of

April 14, 2002 and those transferred from the facility since January 1, 1998. Class Certification Order at 3.

2. The MSDC is a fully certified Intermediate Care Facility for the Mentally Retarded [ICF/MR] as defined in Title XIX of the Social Security Act [42 U.S.C. § 1396d(a)(15) and (d); Ind. Code § 12-15-2 *et. seq.*; 42 C.F.R. §§ 483.400 – 483.480; 410 Ind. Admin. Code § 16.2-1.19 and 431 I.A.C. § 1.1-1-14.

3. The Defendants are the Governor and State officials responsible for the operation of MSDC.

4. This Court, on April 29, 2002, entered a Preliminary Injunction in this case prohibiting the Defendants from the following:

a. Removing, transferring or discharging any Plaintiff or Class member from MSDC absent any of the following:

i. Obtaining the written consent of the guardian of record of the patient, which written consent explicitly states that the guardian has received notice of this Preliminary Injunction, and after such advise, decides that the best interests of the ward is to transfer to another facility.

ii. Transfer to an acute care facility for additional medical treatment that cannot be accomplished at MSDC.

b. Restricting in any manner the return to MSDC of any former patient that was transferred or discharged and now wants to return to MSDC.

c. Pressuring in any way any parent or guardian to transfer their son, daughter or ward into transferring from MSDC to another facility.

- d. Reducing or removing existing staffing levels at MSDC, unless the conduct of the employee violates applicable statutes, regulations or rules of the facility.

5. Following the Defendants' interlocutory appeal of this Court's Preliminary Injunction, the Indiana Court of Appeals affirmed portions of the Preliminary Injunction, noting that the Preliminary Injunction was properly issued in that the Defendants do not presently have suitable alternative facilities to render the specialized care needed by these Patients-Class Members and that until suitable facilities exist to render proper and needed care to these patients, MSDC may not close. The Court of Appeals also affirmed this Court's determination that former patients may return to MSDC if their new facilities do not render appropriate care.

6. Evidence presented at the preliminary injunction hearing indicates that the census at the time this Court entered its preliminary injunction was approximately 200 persons.

7. Evidence was presented at the settlement approval hearing that indicates that the current census at MSDC is 121. There have been nine deaths at MSDC since the Court's entry of a preliminary injunction. Thus, approximately 70 persons, out of 200, have been placed in the community since the injunction.

8. Evidence was also presented at the settlement approval hearing that the guardians or health care representative of those of the persons so placed have consented to the placements in writing, after being advised of this Court's preliminary injunction.

9. Counsel have notified the Court that a settlement agreement has been reached following several mediation sessions with Class representatives, Defendants' representatives, counsel, and the United States Magistrate assigned to the federal claims in this bifurcated case. As a result, the Court set the matter for a hearing to consider approving the settlement agreement as required by T.R. 23(E).

10. The Settlement Agreement presented to the Court contains the following provisions that counsel have agreed upon in mediation with the United States Magistrate. Counsel have negotiated the following terms to resolve in their entirety the parties' disputes:

- a. Parents, guardians and healthcare representatives of MSDC Patients will sign forms agreeing to release all *necessary* information pertaining to their children or wards to allow MSDC staff and transfer team planners to disclose this information to and discuss future placement with other facilities to determine if other facilities are able to provide adequate care for the individual patient. These "Release of Information" forms shall be clear to all concerned that they *are not consents to a transfer* of the patient, but *only for the release of the patient's information*. The parents, guardians, health care representatives and Class members agree to participate in the transition process in good faith and to cooperate with the transition teams to attempt to obtain appropriate placements for the patients. To the extent they have not already done so, family members and/or next friends who are pursuing this litigation on behalf of a class member will take the necessary steps to secure authority to act as health care representatives of the relevant class member. Defendants will provide reasonable assistance to family members in securing such authority.
- b. If requested by the patient's parents, guardian, or healthcare representative, the patient's primary care physicians shall participate in the transfer team meetings and in the determination that the placement of the patient in the new facility is appropriate.

- c. If it is determined that a patient is able to be placed in another facility and that the new facility is able to provide adequate care, the parent, guardian, or healthcare representative and the patient shall be given at least 15 days notice prior to the patient being transferred.
- d. If the patient's placement in the alternative facility is not suitable or becomes unsuitable, then the patient will have the option of either returning to MSDC, if it is still available, or being transferred to another facility that is able to provide appropriate care to meet his or her care requirements.
- e. The Defendants shall maintain the ratios of staff to patients that were agreed in the case brought by the United States Department of Justice in the District Court for the Southern District of Indiana, *United States of America v. Indiana, et al.*, IP-00-1991-C-B/S, or in the current Medicaid regulations existing for ICF/MR facilities promulgated by the Centers for Medicare and Medicaid Services (CMS) or the Office of Medicaid Planning and Policy (OMPP) and Indiana Family and Social Services Administration (IFSSA), which ever is greater. Those agreed ratios are incorporated herein by reference.
- f. The parties agree that communication between the transition teams and the parents, guardians or healthcare representatives is necessary. The Plaintiffs contend that Defendants have used "scare tactics or threats of sudden closure" to attempt to persuade parents, guardians or healthcare representative to agree to transfer their children or wards from MSDC to other facilities. The

Defendants dispute this contention, but for purposes of settlement agree not to use such tactics.

- g. In the event of a dispute between the Defendants, their transition teams and the patients, their parents, guardians or healthcare representative as to whether a placement will be able to provide adequate care for their patients, the issue may be referred for resolution to the trial court which ordered the commitment of the patient to MSDC. The State's commitment statutes, as well as applicable federal and state Medicaid law, will apply to this dispute and the patients, their parents, guardians or healthcare representatives will have the right to ask the committing court to appoint counsel to represent them pursuant to Ind. Code §34-10-1 and 2.
- h. All parties agree that the best interests of these patients are the primary concern herein and that the patients must receive appropriate treatment. Adequate and suitable placement in alternative facilities may be made, but only if adequate alternative facilities exist to provide the needed care for these patients. The adequacy and suitability of proposed alternative placements will, in the absence of agreement between the Defendants and the particular patient's parents, guardians or health care representatives, be determined on an individual basis pursuant to paragraph 7(g) above. A target date to close MSDC of January 1, 2005 has been proposed. However, the parties agree that all patients must be placed in adequate facilities that are able to meet their needs before any such closure can be completed.

- i. Finally, the Parties agree that Class Counsel shall be paid an attorney fee from the Defendants for the successful prosecution of this action. While Class Counsels' billable time at prevailing billable rates exceed \$250,000.00, Class Counsel is willing to accept and the Defendants are willing to pay the sum of \$175,000.00 in attorney fees to finalize this agreement and conclude these matters. The Defendants agree to pay \$175,000.00 attorney fees to David F. McNamar, MCNAMAR & ASSOCIATES to divide it for further distribution to his co-counsel.
- j. The parties agree that this Settlement Agreement is reached to obviate the need for further injunctive relief by the Class, and this Settlement Agreement replaces the Preliminary Injunction entered by this Court and affirmed by the Indiana Court of Appeals. The case pending in the United States District Court may be dismissed. This Court, however, shall retain jurisdiction to enforce any part of this settlement agreement until such time as MSDC shall close or the parties otherwise agree to dismiss this case.

11. The Court must make several findings before it can approve a Settlement Agreement in a class action proceeding. It must find:

- a. Whether there is opposition to the Settlement Agreement and the degree of opposition, if any, to the same;
- b. The strength of the Class' case on the merits measured against the terms of the settlement agreement;
- c. The complexity, length, and expense of continued litigation;

- d. The benefit of the settlement to class representatives and their counsel compared to the benefit of the settlement to class members;;
- e. The opinion of competent counsel as to the reasonableness of the settlement; and,
- f. The stage of the proceedings and the amount of discovery completed. *Hefty v. All Other Members of the Certified Settlement Class*, 680 N.E.2d 843, 851-852 (Ind. 1997); *Community Care Centers, Inc. v. IFSSA* 716 N.E.2d 519, 531 (Ind.Ct.App. 1999).

12. The Court finds that the evidence and points made by counsel herein establish the following:

- a. While there is some opposition to the settlement agreement, the opposition centers upon the parents, guardians, and health care representatives' desire that MSDC be keep open and that it continue in operation to provide care to their children or wards for an indefinite period of time. The Court finds that it cannot order the Executive and Legislative branches of Indiana Government to continue indefinitely the operation of a specific facility, though it may be able to protect the Class Members by requiring that MSDC be available if there are no other adequate placements That is what this Court's Preliminary Injunction Ordered, though defendants still dispute the propriety of that order, and in fact have filed a petition to transfer to the Indiana Supreme Court. The Settlement Agreement requires that MSDC remain open until the placement of residents in suitable alternative facilities to provide necessary care for them.

Importantly, *Hefty* requires the Court to consider the *degree* of opposition. From a class of more than 300, the Court has received objections on behalf of only six class members: Class representatives Frank and Joyce Migliano have objected on behalf of their son, Frank Migliano, Jr.; Patricia D. Morgan has objected on behalf of her brother, Michael J. Parker;¹ Wayne Rupenthal has objected on behalf of his ward, Gregg Vogt; James and Rita Boone have objected on behalf of their son; Bob Patrick has objected on behalf of his daughter, Karen Jean Patrick; Stephen Bonowski has objected on behalf of his brother, Martin Bonowski. None appeared at the hearing, however, to voice any objections.

Seven objections out of a class of more than three hundred, or even out of the 121 persons still resident at MSDC is not such a level as to cause the Court concern that the settlement is not in the best interest of the class. Still, the Court is sensitive to the welfare of each member of the class, and will therefore consider their objections individually. Moreover, although not all of the objections recite that the individuals making them are guardians or health care representatives, the Court will assume for purposes of this order that the persons lodging the objections have proper standing to do so on behalf of the respective class members.

1. **Frank Migliano, Jr. (Objections filed by both of his parents, Frank and Joyce Migliano).** These objections caused the Court the most concern when received, because the Miglianos are also class representatives and because they were also the most detailed. However, the Court was advised at the

¹ Rick Parker has also objected on behalf of his brother, Michael Parker. Based on evidence at the hearing that there is only one Michael Parker who is resident at MSDC, the Court finds that these objections are both filed on behalf of the same class member.

hearing that the Miglianos withdrew their objections and that they support the settlement. Accordingly, the fact that the class representatives now support the settlement weighs in favor of its approval. Nonetheless, because Mr. Migliano's objection to the Court purported to relay the (perhaps unfilled) concerns of other members of the Muscatatuck Association of Retarded Citizens ("MARC"), the Court will address the substance of those objections.

- i. First, Mr. Migliano points to what he perceives as "ambiguities" or "conflicting statements" in the settlement. He compares a provision in the settlement (paragraph 7(h) of the settlement itself) which states that the parties agree that the closure of MSDC cannot be completed until all residents are placed in adequate facilities that are able to meet their needs, with a provision in the class notice that the settlement, once approved will be binding on all class members and will prevent them from pursuing claims relating to the closure of MSDC in another lawsuit. Upon review of the entire settlement agreement, the Court finds neither any ambiguity nor any conflict. The defendants, understandably, want their disputes with the class resolved, and that any further disputes over specific placements will be resolved under the framework set forth in the settlement agreement. Nevertheless, the defendants have agreed that the closure cannot be completed until the residents are placed in adequate facilities that meet the residents needs, and the settlement agreement provides a dispute resolution mechanism in

the event that, in an individual instance, a class member and the defendants cannot agree over whether a particular placement is “adequate” or “meets [the resident’s] needs” With the dispute resolution mechanism specified in the settlement, it is plain that there is “recourse” to assure that the terms of the settlement are met. What there is not is an absolute right in either party to unilaterally say whether a placement is adequate. Accordingly, the Court finds that this objection based on “ambiguity” or “conflict” between the settlement and the class notice does not provide a reason to disapprove the settlement.

- ii. Mr. Migliano also suggests that the provisions of paragraph (a) of the settlement, which provides for class members’ representatives to sign a medical release which makes clear that it is not a consent to transfer conflict with those of paragraph (c) which provides that upon a determination that a resident may be transferred in conformity with the terms of the settlement, the parent, guardian or health care representative shall be given 15 days notice of the transfer. Again, there is no conflict. As the settlement was explained at the hearing, the notice provision may be invoked only in the event that no agreement to the adequacy of the placement can be reached, which will trigger the dispute resolution mechanism in paragraph g. In essence, the notice provision represents the defendants’ commitment that there will be no abrupt

transfers without the consent of the parent, guardian or health care representative, and the 15 day period allows the commitment court time to act, including time to issue an order blocking the transfer pending a decision of the commitment court, if appropriate.

Defense counsel indicated that his clients would not object to removal of the 15-day period, if that were deemed appropriate, but stated that he believed that the notice period was appropriate and useful for the reasons stated above. In any event, the notice provision does not conflict with the provision that the consent to release medical records is not, in and of itself, a consent to transfer. This provision does not provide a basis for the Court to disapprove the settlement.

- iii. In the same paragraph, Mr. Migliano objects to the substance of the dispute resolution mechanism, rather than any ambiguity or conflict with the other terms of the settlement. He states that the process is “cumbersome, expensive and time consuming litigation” and he states that the class members cannot afford to pursue that remedy and would not qualify for court-appointed legal representation. As counsel pointed out at the hearing, in the eyes of the law, the person seeking legal representation will be the resident, not his health care representative or guardian. And all or nearly all of the residents are on Medicaid and therefore, by hypothesis, indigent. In addition, as a practical matter, there must

be *some* forum for individual disputes over the adequacy of a placement to be litigated. Accordingly, the Court finds that this objection does not serve as a basis to disapprove the settlement.

- iv. Mr. Migliano also relays an objection to a provision in the class notice that states that class counsel may seek further attorneys fees. This provision is not part of the settlement, but rather of the notice. Defense counsel was quite clear at the hearing that the *State's* only obligation with respect to fees is the \$175,000 specified in the settlement, and Class Counsel stated that he would not seek further fees from the Class.
- v. Mr. Migliano also states that the defendants have “done nothing to provide alternative facilities to accommodate these patients.” The evidence at the hearing was to the contrary, and in fact, the defendants have been able to place, apparently successfully, some seventy residents since the preliminary injunction was entered. In addition, the Settlement guarantees that MSDC will not be closed until all residents are placed in adequate placements that meet their needs. Accordingly, this objection does not provide a basis for disapproval of the settlement.
- vi. Mr. Migliano also states (it is not clear whether this is an objection) that his organization believes that the plaintiffs’ attorneys should be compensated by the State of Indiana. Without deciding whether, as a matter of law, this is correct (a matter

considered to some extent below in the Court's analysis of the strength of the plaintiffs' case and the benefits to class counsel), the Court observes that, under the settlement, class counsel will be compensated by the defendants in the amount of \$175,000. This objection does not provide a basis to disapprove the settlement.

vii. Mr. Migliano also states that "Muscatatuck should remain open in some form until alternative facilities are available to provide equivalent care." Again, the Court notes that, under the settlement, MSDC cannot be closed until its residents are placed in adequate facilities that meet their needs. Thus, this objection does not provide a basis to disapprove the settlement.

viii. Finally, Mr. Migliano notes that "class members had very little participation in the settlement mediation after the first mediation session" and had none after the Lowe Gray firm ceased business. However, evidence at the hearing established that class counsel kept the class informed, in telephone conversations, by correspondence and through in-person contact, by attending meetings with the MARC group. There is no requirement that the parties themselves negotiate the precise terms of the settlement, as long as they agree to it. In a class action, agreement by a class representative and the defendants are all that is required (in addition to approval by the Court under the *Hefty* factors, of

course). Mr. Migliano was reported to have stated that he agrees with the settlement and urges approval.

2. **Michael J. Parker (Separate Objections Filed by Patricia D. Morgan and Rick Parker)** Mr. Parker's brother's and sister's objections are to the effect that they would like to have him stay at MSDC for the rest of his life. As the Court has previously stated, the Court does not have the power to order MSDC to stay open indefinitely. The Court previously halted transfers based on what was then a lack of evidence of adequate alternative placements. The proposed settlement assures that Muscatatuck will remain open until its residents are placed in adequate placements that meet their needs. The Court never intended anything more than that, and in fact, cannot do anything more than that. These objections do not serve as a basis to disapprove the settlement.
3. **Gregg Vogt (Objection filed by guardian, Wayne Rupenthal)** The objection filed on behalf of Mr. Vogt is not so much an objection as a series of questions: (1) Will all residents be placed in group homes regardless of their mental abilities?; (2) What is the law concerning the dispensing of drugs in group homes?; (3) What are the housing plans for the severely retarded in the Indianapolis area? While the Court cannot answer all of those questions with certainty, the Court notes that evidence at the hearing disclosed at least three types of placements: group homes, supported living (waiver homes) and some institutional placements. The Court also notes that there was evidence concerning steps that the defendants have taken to improve care and oversight

in community placements, which would include oversight relating to the dispensing of drugs. Finally, there was evidence at the hearing that the group home and supported living placements are likely to be created in the locations where there is the most demand and where the needs of the residents can be best served. This will almost certainly include some placements in or near the State's largest city. To the extent that the balance of the objection can be construed as a general request that MSDC remain open indefinitely, it has already been addressed above. In sum, the objection does not provide a basis to disapprove the settlement.

4. **Objection Filed by James and Rita Boone on behalf of their son.** This objection expresses the Boones' concern for their son and asks for the Court's protection. The Court construes the objection as a general request that MSDC remain open indefinitely. As such, it has already been addressed above and does not provide a basis to disapprove the settlement.
5. **Karen Jean Patrick (Objection filed by Bob Patrick)** Mr. Patrick expresses the opinion that his daughter cannot function in a group home and that MSDC should remain open. The Court notes, as it has noted above, that group homes were only one of three placement alternatives of which evidence was presented at the hearing. The Court also notes that MSDC will remain open until all of its residents are placed in appropriate placements. The Court finds, as with other objections of this tenor, that this objection does not serve as a basis to disapprove the settlement.

6. **Martin Bonowski (Objection Filed by Stephen Bonowski).** Mr.

Bonowski's objections in many ways mirror the objections filed by the Miglianos.

- i. Initially, Mr. Bonowski complains that the term "appropriate placements" is not defined and that there is no information on who makes a decision on what placement is appropriate. The settlement specifies that MSDC must remain open until all residents are placed in adequate placements that meet their needs. The adequacy of placements must be determined on a case-by-case basis. . There was testimony at the hearing that the adequacy of a placement includes a broad range of developmental, behavioral and medical needs that will vary from resident to resident. The Court finds that lack of a further specific definition does not serve as a basis to disapprove the settlement. In addition, the settlement *does* specify who will decide whether a placement is adequate. Ideally, that decision will be jointly made by the defendants and the affected class member or his representative. If that is not possible, a court will decide. That is how our system of justice works, not only with respect to this settlement, but with respect to a myriad of legal terms and facts on which there can be principled difference of opinion. As the Court found in addressing the Miglianos' objections, this objection does not provide a basis to disapprove the settlement.
- ii. Mr. Bonowski also objects to the requirement that he (and other health care representatives and guardians) will "participate in the transition

process in good faith.” As defense counsel explained at the hearing, this was a key requirement of the defendants to enter into the settlement. A requirement to participate in good faith should not be burdensome for the representative, for it means only that the representative must approach the process with a genuine willingness to reach agreement, if that is possible without harming the interests of his ward. The Court believes that, in these circumstances, that is a guardian’s or health care representative’s legal obligation even absent the settlement. For the guardian or health care representative acts in a representative capacity only. His or her personal opinions may not be preferred to the best interest of his or her ward.

- iii. Mr. Bonowski also expresses concern that the cooperation provisions in the settlement may require him to make visits to Indiana that he would otherwise not make. The Court reads the settlement to require only such cooperation as is reasonable under the circumstances. In this age of technology, much of that cooperation may be by telephone, fax, email and the like. Of course, Mr. Bonowski may wish to assure himself as to the appropriateness of an alternative placement with an in person visit, and he certainly might be hampered in any hypothetical court dispute over whether a placement is appropriate if he has not seen it. But the cooperation provisions themselves do not require burdensome travel. This objection does not provide a basis to disapprove the settlement.

- iv. Mr. Bonowski also objects that as a State run institution, MSDC provides a sort of “automatic” quality assurance. In this he is simply incorrect. The *only* quality assurance standards to which MSDC is subject are the Medicaid certification requirements and the requirements of the ADA. These statutes and their implementing regulations also apply to private facilities. In addition, MSDC has, in the recent past, been out of compliance with those requirements and was decertified. This objection does not provide a basis to disapprove the settlement.
- v. Mr. Bonowski also objects to the 15-day notice provision and the dispute resolution mechanism. The Court has already explained the interplay of those provisions in addressing the objections filed by the Miglianos. For the same reasons, the Court finds that these objections do not provide a — basis to disapprove the settlement.
- vi. Finally, throughout Mr. Bonowski’s objection, he expresses concern based on the fact that he lives at a great distance from Indiana. At present, he is, in essence, relying on the State to make sure that his brother is appropriately cared for. Under the settlement, he will similarly be relying on the State to do so, through its regulation and inspection of private providers. Mr. Bonowski may ultimately decide that his brother would be better served by a representative who resides closer to Indiana, even if that person is not a relative. This concern is really no different, whether his brother remains at MSDC or is placed in another setting. While the Court sympathizes with the difficulties created by the current distance between

Mr. Bonowski and his brother, they do not provide a basis to disapprove the settlement.

- b. In measuring the strength of the Class's case against the relief obtained in the settlement, the Court starts with the fact that it found that the Class had a reasonable probability of prevailing on the merits when it entered that previously described Preliminary Injunction.

However, this is not the same thing as saying that the Class had a strong case or was very likely to win. That is not the Court's role in addressing a request for a preliminary injunction. Rather, the Court determines whether the party seeking the preliminary injunction has some likelihood of prevailing on the merits, and then weighs that likelihood along with the potential irreparable harm involved in granting or denying the injunction. The greater the potential irreparable harm, the smaller the likelihood of prevailing needed to support a preliminary injunction.

Since the preliminary injunction, much has transpired, and a number of the legal issues in this case have been brought into sharper focus. Two of the four provisions in the preliminary injunction were reversed outright by the Court of Appeals. Petitions to Transfer were filed by both sides. In addition, the Indiana General Assembly has acted twice, once passing SB 217, which appeared to give a veto regarding alternative placements to class members' representatives, and then amending the statute to remove the language appearing to give that veto. In addition, the issues were clarified on appeal, and according to the Court of Appeals, the portion of the injunction still in force rests on Ind. Code 27-12-2-1.

Given the legal uncertainties that remain in this case, and given the fact that the settlement provides the relief asked by the class in its Complaint and contained in the statute most clearly applicable to MSDC, the strength of the plaintiffs' case, measured against the relief in the settlement favors approval.

- c. Class Counsel and the Defendants' Counsel agree that continuing with this litigation would be very expensive for both parties. Class Counsels' attorney fees alone to date exceed \$275,000.00 and would be substantially greater in prosecuting this case through trial. The Defendants would incur similar expenses. There would be expert witness fees and additional discovery costs as well as the cost in time of all concerned, including the courts. These cases would also be lengthy to try with the complexities of Indiana's requirements for care for the developmentally disabled, including the Indiana statutes described above, and other Indiana Statutes (possibly including ones that incorporate federal requirements) that might be brought into play if this case continued through trial. This factor favors approval of the settlement agreement.
- d. Measuring the benefit to the class representative and counsel against the benefits to the class yields a more neutral conclusion. The class representatives receive no special benefits under the settlement. Class counsel, on the other hand, receives a substantial fee from the Defendants.

Under *Indiana* law, there is no basis for class counsel to obtain a fee award in a litigated resolution, *from the Defendants*. However, as noted above, there may be a basis for class counsel to recover from the class, depending on the contractual arrangement between class counsel and the class. Accordingly, since

the class *also* could not recover its fees from the Defendant in a litigated resolution, the fee provision should also be considered as a benefit to the class as a whole, at least to the extent the class would otherwise be liable to its counsel.

The Court also notes that it is not uncommon for class counsel to obtain its attorneys fees from defendants in the settlement of class actions, particularly where there is a prospect of a fee award. Here, there is at least a prospect of such an award in the federal action, which was brought under 42 U.S.C. 1983.

Still, *Hefty* teaches that the court should scrutinize such fee payments with particular care, as they could be an indication that class counsel is favoring his own financial interest over the interests of the class. The Court has done so. As represented in the settlement, class counsel's total time in the case has a value of \$275,000, but the fee payment from the defendants is substantially less, \$175,000. Counsel for both parties represented to the Court that they had reviewed class counsel's time records to verify that fact, and would make those records available to the Court if necessary. Thus, while mindful of the concerns expressed in *Hefty* that a payment from the Defendants to class counsel could indicate that class counsel is favoring his own interests over those of the class, the Court finds as a fact that the payment is, instead, a reasonable compromise over fees class counsel legitimately believes are due, which he has been able to negotiate from the Defendants, rather than seeking to recover them from the class.

In addition, the Court has concluded above, that the Class has obtains under the settlement all of the benefits that it is likely to receive if the cases were to go forward, be tried successfully and withstand all appeals. As noted in the above

findings, the Class is assured of appropriate placements with adequate care and Class Members have remedies to resolve any disputes as to being placed appropriately. MSDC cannot close without these adequate placements. Thus, the Court finds that the Settlement Agreement provides the same relief that the Class could obtain if the cases were to proceed to trial and prevail. Thus, this factor favors approval of the settlement.

- e. Class Counsel is of the opinion that this Settlement Agreement is in the best interests of the Class. Class Counsel is experienced in litigation and handling class actions. He previously was able to settle the matter of the State's nursing homes rate disputes with the two of the Defendants herein in the case of *Community Care Centers, Inc. v. IFSSA*, 716 N.E.2d 519 (Ind.Ct.App. 1999). Class Counsel also advised the Court that there is no further relief that could be obtained by the Class herein if this litigation continued and were successful. The Court therefore finds that this factor favors approval of the Settlement Agreement.
- f. Finally, the Court notes that this matter has proceeded through sufficient discovery at the preliminary injunction stage, and legal development through the appeals that both sides are aware of the strengths and merits of their respective cases and have been able to negotiate this settlement based upon those evaluations. The settlement was reached after painstaking negotiations, and was not tendered to the Court until nearly two years after this case was filed. Thus, the stage of the litigation favors approval of the settlement agreement.

9. Therefore, the Court finds that the Settlement Agreement meets the tests of *Hefty*, and *Community Care Centers, Inc., supra*, and should be APPROVED.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact from the evidence admitted and the arguments of Counsel, the Court now enters the following Conclusions of Law:

1. The Court concludes that the facts and law favors the approval of this Settlement Agreement. The parties have demonstrated to the Court that the tests of *Hefty*, and *Community Care Centers, Inc., supra*, have been met and that the best interests of all parties herein is to APPROVE this Settlement Agreement to resolve these disputes.
2. The Court therefore APPROVES this Settlement Agreement and the terms are hereby incorporated into this ORDER which shall control the actions of the Parties herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Settlement Agreement is APPROVED and that the Parties hereto shall conduct themselves accordingly.

All of which is ORDERED this 28th day of January, 2004.



Hon. William E. Vance, Special Judge
Jennings Circuit Court

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